No. 12,538

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD WILLIAMS,
Appellant,

v.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below," denying appellant's petition for writ of habeas corpus and discharging writ of habeas corpus. (Tr. 32-33.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255, which superseded Title 28 U.S.C.A, Sections 451, 452 and 453. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by

Title 28 U.S.C.A., Section 2253, which superseded Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below denying appellant's application for relief and discharging the writ of habeas corpus. (Tr. 32-33.) The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus, in which he alleged in substance that he was illegally restrained of his liberty by the appellee, the Warden of the State Penitentiary, because he was denied his right of assistance of counsel before the trial Court and that his plea of guilty was not voluntarily entered. (Tr. 1-21.) The Court below issued an order to show cause. (Tr. 22.) The appellee filed a return to order to show cause. (Tr. 23-25.) Appellant filed a traverse to return. (Tr. 26-31.) Thereafter a writ of habeas corpus was issued (Supp. Tr. 1-2, 3-4), to which appellee filed a return. (Supp. Tr. 5-7.) The hearing was granted on the writ of habeas corpus at which hearing appellant was represented by counsel. (Supp. Tr. 11.) It was stipulated between counsel that the traverse to the return to the order to show cause would be deemed as the traverse to the return to the writ of habeas corpus. (Supp. Tr. 12.) During the hearing appellant testified in his own behalf and documentary evidence was received in evidence on behalf of the appellee. (Supp. Tr. 11-76.) Thereafter, the Court below, after con-

sidering the cause, made its order denying appellant's application for relief and discharged the writ of habeas corpus (Tr. 32-33), and made the following findings of fact and conclusions of law adverse to appellant:

"FINDINGS OF FACT

I.

That petitioner is a citizen of the United States;

II.

That the petitioner is detained by respondent, E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 6718, by the District Court of the United States for the Western District of Tennessee, Western Division, hereinafter called 'the trial court,' on the 6th day of September, 1945, and under and by virtue of the judgments and sentences and warrants of commitment duly and regularly issued in criminal causes numbered 8489 and 8490, by the District Court of the United States for the Southern District of Indiana, Indianapolis Division, on the 19th day of March, 1946, and transfer order dated the 20th day of March, 1947, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

III.

That petitioner makes no contentions against the validity of the judgments and sentences in said criminal causes numbered 8489 and 8490, wherein he was sentenced to concurrent terms of 5 years for violations of the National Motor Vehicle Theft Act (18 U.S.C.A. 408), Assaulting an Officer (18 U.S.C.A. 254), and Escape from a Federal Penal Institution (18 U.S.C.A. 753-h), the sentences to run consecutively to the sentence heretofore imposed upon him by the trial court in said criminal cause numbered 6718; that with good time credits earned, the petitioner has already served a 5 year sentence;

IV.

That this is the first petition for writ of habeas corpus filed by the petitioner herein; that petitioner, in his application for writ of habeas corpus, attacks the validity of the judgment and sentence in said criminal cause numbered 6718; that the contentions advanced by the petitioner in his application for writ of habeas corpus were also urged by him, in said criminal cause numbered 6718, in his motion to vacate his judgment of conviction which was decided adversely to him by the trial court on the 21st day of September, 1948; that this order denying the petitioner's motion to vacate his judgment of conviction, in the aforesaid criminal cause numbered 6718, was affirmed by the United States Court of Appeals for the Sixth Circuit; that the mandate of the appellate court affirming the aforesaid order was filed in the trial court on the 16th day of November, 1949;

V.

That the indictment was returned in said criminal cause numbered 6718 by the Grand Jurors of the United States District Court for the Western District of Tennessee, Western Division, on the 5th day of September, 1945; that the indictment in said criminal cause numbered 6718 was in two counts and charged a violation of the National Motor Vehicle Theft Act, Title 18 U.S.C.A, Section 408;

VI.

That petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial court in said criminal cause numbered 6718; that the court, on learning that petitioner was without counsel, offered to appoint counsel to represent him, and that the petitioner declined the offer of the trial court to appoint counsel for him and elected to act as his own counsel, and so informed the trial court; that in waiving his right of assistance of counsel before the trial court, in said criminal cause numbered 6718, the petitioner did so intelligently, competently, intentionally, freely, and voluntarily;

VII.

That petitioner was duly arraigned before the trial court in said criminal cause numbered 6718, knew the nature of the charge against him, and intelligently, competently, intentionally, freely, and voluntarily entered a plea of guilty to the charges contained in the indictment, in said criminal cause numbered 6718;

VIII.

That there was no fraud, trickery, misrepresentations, force or coercion practiced upon the petitioner in any manner whatsoever by any agents, officers, employees or representatives of the Government, for the purpose of having petitioner enter a plea of guilty to the charges contained in the indictment, in said criminal cause numbered 6718; that petitioner has abandoned the contention which he originally made in his application for writ of habeas corpus, that he was induced and persuaded by the misrepresentations of agents of the Federal Bureau of Investigation to enter a plea of guilty to the charges contained in the indictment, in said criminal cause numbered 6718, said petitioner testifying, under oath, during the habeas corpus proceedings that these accusations had no basis in fact; that petitioner's statement that a United States Attorney, or an Assistant United States Attorney, had a conversation with him prior to his appearance before the trial court, with reference to petitioner entering a plea of guilty to the charge contained in the indictment, in said criminal cause numbered 6718, is untrue;

IX.

That shortly after petitioner's apprehension and on July 14, 1945, petitioner was interviewed by Willis S. Turner, a Special Agent of the Federal Bureau of Investigation, to whom he freely and voluntarily admitted his commission of the offenses for which he was later indicted, in said criminal cause numbered 6718; that thereafter and on July 18, 1945, in a subsequent interview

with the aforesaid Willis S. Turner, in the presence of David E. McCollum, Special Agent of the Federal Bureau of Investigation, the oral confession of the petitioner, heretofore given on July 14, 1945, was reduced to writing, which written statement petitioner freely and voluntarily signed;

X.

That the petitioner had a full, fair and impartial hearing upon his plea of guilty, entered in said criminal cause numbered 6718;

XI.

That the petitioner, upon his plea of guilty to the two charges contained in the indictment, was sentenced to consecutive terms of 5 years in an institution to be designated by the Attorney General;

XII.

That prior to his sentence by the trial court, petitioner had a long record of convictions, including a felony conviction;

XIII.

That, as petitioner himself testified under oath during the habeas corpus proceedings, petitioner was guilty of the charges contained in the indictment in said criminal cause numbered 6718 and desired to plead guilty to the said charges and be sentenced by the trial court, in the hope that by such plea the authorities of the State of Virginia, where he was wanted for escape and assaulting a guard, and to which State he did not wish to return, might not thereafter press

charges against him; that this idea was petitioner's own idea, and no agent, officer, employee or representative of the Government at any time suggested the idea to him, or discussed the matter with him, or promised him anything;

XIV.

That petitioner has failed to sustain the burden of proving that he was denied due process of law or any of his constitutional rights before the trial court.

CONCLUSIONS OF LAW

I.

That the allegations made by petitioner in his application for writ of habeas corpus are wholly without merit;

II.

That none of the constitutional rights of petitioner were violated before the trial court;

III.

That petitioner was not denied due process of law before the trial court;

IV.

That the sentence which the petitioner is now serving in said criminal cause numbered 6718 is a valid judgment presently in full force and effect;

V.

That petitioner is now in the lawful custody and control of the respondent;

ORDERED: The petition for writ of habeas corpus is dismissed and the writ of habeas corpus is discharged."

From this latter order appellant now appeals to this Honorable Court. (Tr. 34.)

CONTENTIONS OF APPELLANT.

The contentions of appellant, as stated in his opening brief herein, at page 8, are as follows:

"1. That all of the facts and circumstances as developed by the evidence in the Court below show that he was not provided with counsel when he entered his plea of guilty to the indictment of Criminal Cause 6708.

2. That the facts and circumstances show that the plea of guilty made by the appellant was perhaps induced by some federal official and for that reason violates the due process clause."

QUESTION.

Are the contentions of the appellant supported by the record?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The appellee respectfully calls the attention of this Honorable Court to the undisputed finding of the Court below that prior to his sentence by the trial Court, petitioner had a long record of convictions, including a felony conviction. (Tr. 47.) Thus the Court below could have disbelieved everything the appellant said and by relying solely on the presumption laid down by the Supreme Court of the United States in

Johnson v. Zerbst, 304 U.S. 458, 468,

that when collaterally attacked, the judgment of the Court carries with it the presumption of regularity, could have also properly arrived at the conclusion, which it did, that the appellant was not denied due process of law. See also

Hall v. Johnston, 86 Fed. (2d) 820, 821,

wherein this Honorable Court declared:

> "* * * the trial Court had jurisdiction and as nothing appears upon the face of the record to indicate the contrary, the presumption will obtain that the defendant's rights were carefully guarded throughout the proceedings."

Bearing in mind this presumption, and bearing in mind also the familiar rule that the Court is the sole judge of the credibility of witnesses in a proceeding before it without a jury, and the equally familiar rule that its findings cannot be set aside unless clearly erroneous,

Pers v. Hudspeth, 110 Fed. (2d) 812;

Macomber v. Hudspeth, 115 Fed. (2d) 114, 116;

Kelly v. Johnston, (C.C.A.9), 128 Fed. (2d) 793, 794;

Gimpleson v. Kaufman, et al. (C.C.A.9), 167 Fed. (2d) 672, 675,

the appellee will now discuss the contentions of appellant in the order in which they are raised by him.

I.

THE ALLEGED DENIAL OF ASSISTANCE OF COUNSEL.

Appellant's contention that he was denied his right of assistance of counsel is not borne out by the record. The trial reporter's transcript of proceedings (respondent's Exhibit "D") shows that the appellant was offered the assistance of counsel but persistently refused the offer. Here was an intelligent waiver of a constitutional right by a confirmed, although a youthful, criminal, who knew of that right. Here was no novice in such matters; here rather was a flagrant violator of the law, whose frequent appearances before the courts had familiarized him with all the protections which the Constitution, through these same courts, afforded him. That appellant did not desire counsel was his prerogative. He knew that he was guilty of the crimes charged, and he also knew that, with or without the assistance of counsel, he could not avoid the consequences of his unlawful acts. His complaint, therefore, in this regard, was patently without merit, as the Court below found. Such a finding should not be disturbed.

II.

THE ALLEGED INVOLUNTARY GUILTY PLEA.

In his petition, appellant alleged in substance that his plea of guilty was not freely entered because, at the time he was under the impression that he had killed a guard in making an escape from a Virginia penal institution, he was told by representatives of the Government that if he did not so plead he would be immediately returned to Virginia to face a charge of murder as well as a charge of escape. During the hearing on the writ, appellant abandoned this contention, although he now feebly seeks to raise it again in his opening brief. The testimony of the agents and the prosecuting attorney, received in evidence in affidavit form, clearly negates such unsupported and unfounded contention. That appellant did not wish to return to Virginia was, of course, understandable, in view of the violent assault he had committed upon the person of a prison guard in effecting his escape. Certainly no Government agent suggested to him that he should plead guilty as an alternative to his being returned to Virginia. Appellant freely plead guilty because he was guilty. Appellant's abandoned allegation which he now seeks to revive, should find no more support before this Honorable Court than it did before the Court below, which held that it was untrue.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the judgment of the Court below, based on its findings, amply supported by the evidence, is correct and should be affirmed.

Dated, San Francisco, California,
November 3, 1950.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.